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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–46

UNITED STATES OF AMERICA, PETITIONER

v.

DIMAS CAMPOS-SERRANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

This reply brief is deemed necessary because respondent has raised a number of issues in his answering brief that were not presented to this Court in the government's petition for a writ of certiorari [1] and, with but one exception,[2] were not decided by the court of appeals. For the reasons set forth below, we believe

[1] Respondent did present the additional arguments in a "Conditional Cross-Petition" (No. 70–46, October Term 1971), which was filed out of time under Rule 22(2) of the Rules of this Court. This Court has not as yet acted on the cross-petition. We do not suggest that the matters are not properly before the Court. *Langnes* v. *Green*, 282 U.S. 531.

[2] Respondent's contention that the indictment failed to charge an offense under 18 U.S.C. 1546 was fully considered and rejected by the court below (App. 124–126).

that each of these additional arguments is insubstantial, and that this Court, if it agrees with the position we take in our opening brief, can appropriately reverse the judgment of the court of appeals and reinstate the judgment of conviction.

Before we discuss these new issues, we refer briefly to the recent decision in *California* v. *Byers*, 402 U.S. 424, decided after the filing of our initial brief in the present case. *Byers* involved the validity, as against a claim of Fifth Amendment privilege, of a state "hit and run" statute, requiring the driver of a motor vehicle, if involved in an accident, to stop and furnish his name and address. Although the case dealt with a compulsory-reporting statute, rather than, as here, with production of a registration card that the law requires all registered aliens to keep in their possession, five members of the Court employed a similar analysis to the one we have suggested in our initial brief for resolving the "required records" issue in this case.

Both the plurality opinion of the Court and the separate opinion of Mr. Justice Harlan, although differing in other respects, accept the proposition we urge here that, in judging the validity under the Fifth Amendment self-incrimination clause of a reporting or record-keeping scheme, the critical inquiry is whether that scheme is directed at a class of persons inherently suspect of criminal activities (402 U.S. at 428–431; *id.* at 454–458 (Harlan, J., concurring)). If that element is missing, and instead it is shown that the reporting or record-keeping scheme serves a valid,

non-criminal, public purpose—as five members of the Court found in *Byers*—then the fact that a particular individual within the class might be called upon to furnish information that would incriminate him does not alone furnish the basis for a successful assertion of a claim of Fifth Amendment privilege (402 U.S. 430–431; *id.* at. 438–439, 457 n. 9 (Harlan, J., concurring)).

Similar reasoning, we submit, warrants an application of the "required records" doctrine in the present context. We have fully developed the argument in our opening brief and can find nothing in respondent's answer thereto that requires further discussion of the points that we have already made. We turn, then, to the new issues that respondent has raised.

I. THE INDICTMENT CHARGES AN OFFENSE UNDER 18 U.S.C. 1546

Respondent contends that the indictment fails to charge an offense under 18 U.S.C. (1964 ed.) 1546. That provision provides in relevant part:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made * * * [shall be guilty of a felony].

It is argued that an alien registration card is not covered by the statutory language because it is not a "document required for entry into the United States,"

but rather is issued only after initial entry of an alien admitted for permanent residence and thus can only be used for purposes of "reentry." Respondent moved before trial to dismiss the indictment on this ground (App. 10–12), and the motion was denied. In the court of appeals, he again argued for a construction of 18 U.S.C. 1546 that would not include alien registration cards; the argument was fully considered by the court below and rejected (App. 124–126). Both the statutory language and its legislative history support that result.

1. The predecessor to Section 1546 was Section 22 (a) of the Immigration Act of 1924, 43 Stat. 165. That section differed from the provision here in question only insofar as it related to a narrower category of documents, that is, "any immigration visa or permit," as compared with the present "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States." Under the earlier language, Congress had explicitly included within the definition of "permit" (43 Stat. 169) a document known as a temporary reentry permit, used to facilitate the departure and return of aliens who wished to leave the country for a period of less than one year; this temporary permit was to be surrendered upon the aliens' return (43 Stat. 158, 159). Thus, as early as 1924, the statutory scheme contemplated that knowing possession of an altered "permit," useful only for purposes of reentering the United States, was punishable as a felony.

The alien registration receipt card was not issued until 1941. It was authorized under the Alien Registration

Act of 1940, which established a registration requirement for aliens residing in this country. Initially, the cards could not be used to facilitate reentry of resident aliens who departed the United States, but had the sole function of identifying those aliens who had complied with the registration requirements of the Act. See 54 Stat. 673, *et seq.* For reentry purposes, the 1940 Act authorized use of a separate document, denominated a "border crossing identification card," which enabled resident aliens to return to this country after temporary travel to a contiguous nation. 54 Stat. 673.

On May 29, 1952, an Immigration and Naturalization Service regulation (17 Fed. Reg. 4921–4922) was promulgated to provide that the alien registration receipt card, if issued after September 10, 1946, would henceforth serve as a resident alien border-crossing identification card and could be used in effecting a reentry into the United States from a contiguous country. This marked the first time that alien registration receipt cards were recognized as entry documents. Their function in this regard has continued to the present, and, in 1957, it was expanded to include reentry by resident aliens into the United States from other than contiguous nations. 22 Fed. Reg. 6377 (currently 8 C.F.R. 211.1(b), as amended).

On June 27, 1952, Congress amended Section 1546 to its present form in Section 402(a) of the comprehensive Immigration Act of 1952.[3] As noted above,

[3] In 1948, Section 22(a) of the Immigration Act of 1924 (then 8 U.S.C. (1940 ed.) 220) had been repealed as part of a general recodification of the criminal laws, and then reenacted in modified form, with no pertinent substantive change, as Section

the amendment, which was largely unexplained in the various committee reports,[4] substituted the phrase, "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States," for the more limited language of "any immigrant visa or permit."

As the court of appeals found (App. 125), Congress, in redefining the category of documents within the prohibition of 18 U.S.C. 1546, was "expanding," rather than narrowing, the class of entry documents that could be reached. See also *United States* v. *Rodriquez*, 182 F. Supp. 479, 484 n. 3 (S.D. Cal.), reversed in part on other grounds, 288 F. 2d 545 (C.A. 9), certiorari denied *sub nom.*, *Rocha et al.* v. *United States*, 366 U.S. 948. Since 1924, the earlier language had specifically included a "permit" utilized only

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1546 of Title 18, United States Code. See 62 Stat. 683, 771–772, 865. Until 1952, the provision contained the same basic phrase, "any immigration visa or permit" found in the 1924 Act.

[4] See H. Rep. No. 1365, 82d Cong., 2d Sess.; S. Rep. No. 1137, 82d Cong., 2d Sess.; Conf. Rep. No. 2096, 82d Cong., 2d Sess.; S. Rep. No. 1515, 81st Cong., 2d Sess.

[5] While it does not appear from the various committee reports (*supra*, n. 4) that the adoption of this broader language was in direct response to the newly-promulgated regulation authorizing use of alien registration receipt cards as entry documents, it seems apparent as the opinion in *Rodriquez* points out, that Congress did intend, by adding the phrase "other document required for entry," to reach documents, such as passports, alien border-crossing identification cards, and the like, which simply did not fit the prior statutory class of "immigration visa or permit." The fact that Congress may not have focused at the time that the Act was passed on a particular document recently authorized for use in obtaining lawful entry into this country would not remove that document from the purview of the section any more than it would exclude such a document if created now by legislation or regulation.

for gaining reentry after temporary absence in a contiguous country; nothing in the additional phrase, "document required for entry into the United States," suggests a legislative intent suddenly to confine the scope of the section to documents of the type utilized only in making an initial entry.

On the contrary, the new language evinces a clear congressional intent to enlarge the coverage of Section 1546 to all documents of the type designated by law (then and in the future) as useful to aliens in effecting any entry, whether initially or after temporary absence from this country, into the United States. Indeed, the statutory definition of the term "entry," set forth in Section 101(a)(13) of the same Act (66 Stat. 167; now 8 U.S.C. 1101(a)(13)), makes this clear. It states:

> The term "entry means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: * * *.

Since Congress defined "entry" to include reentry by a resident alien, subject only to certain narrow exceptions for unintentional or involuntary depar-

tures, it plainly meant by use of the phrase, "document required for entry," to encompass documents useful in effecting reentry into the United States.[6] Section 101(a)(6) of the 1952 Act (now 8 U.S.C. 1101(a)(6)) specifically recognizes and defines the border-crossing identification card as one kind of reentry document issued to aliens admitted for permanent residence. In addition, Section 223 of the Act (now 8 U.S.C. 1203) recognizes another variety of reentry document that may be issued to permanent resident aliens—a reentry permit. It is difficult to believe that Congress did not intend the possession of these documents, if known to be forged, counterfeited, altered or falsely made, to come within the ambit of Section 1546 merely because they are not used by an alien for purposes of initial entry into the United States. Nor is there any more reason for making such an assumption with respect to the alien registration receipt card, which is explicitly recognized by regulation (8 C.F.R. 211.1(b)) as a permissible document for gaining entrance into the United States "in lieu of an immigrant visa or reentry permit" after a temporary absence of not more than one year.

[6] Respondent quite properly did not premise his argument to the contrary on the meaning of the term "required" in the statute. A literal reading of that term would necessitate excluding virtually every document used for entry purposes, since no immigration document is absolutely essential for alien admission into the United States. For example, citizens have a constitutional right to return to the United States even without a passport or other document. See *Worthy* v. *United States*, 328 F. 2d 386, 394 (C.A. 5). Similarly, the Attorney General

2. Respondent points, however, to the specific reference to alien registration receipt cards in Section 266(d) of the same 1952 Act that contains Section 1546 as ground for construing the latter provision so as not to include such reentry documents. Section 266 (d) provides in pertinent part (66 Stat. 226):

> Any person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration, or an alien registration receipt card, or any colorable imitation thereof, except when and as authorized * * * by the

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is authorized by statute to readmit returning resident aliens without any documentation. See 8 U.S.C. 1181(b).

Moreover, a passport was held to be within the purview of the predecessor to Section 1546 in *United States* v. *Mouyas*, 42 F. 2d 743 (S.D.N.Y.), which involved a separate offense of "personating" another. The provision at issue in *Mouyas* was carried forward in the 1952 Act as paragraph 3 of Section 1546, and the language of that paragraph was also changed to add the phrase "other document required for entry into the United States," so as to parallel the phraseology in paragraph 1 of the same Section. Since the purpose of the additional phrase was to expand the section to entry documents other than visas or permits, it seems clear that the phrase "document required for entry" includes a passport. See S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 647–648.

In view of the foregoing, use of the word "required" in Section 1546 must be read to refer to documents of the kind designated for use in seeking entry into the United States, or, in the words of *Mouyas* describing the nature of a passport, a "usual and permissible type of document for presentation at the time of seeking admission" (42 F. 2d at 745). So construed, the language in question plainly includes an alien registration receipt card, which has been designated as a permissible kind of entry document to be used by returning resident aliens. Cf. *United States ex rel. Polymeris* v. *Trudell*, 284 U.S. 279.

> Attorney General * * * [shall be guilty of a felony].[7]

It is argued that, since Congress clearly was aware of alien registration receipt cards at the time of the 1952 Act, and acted specifically to make the counterfeiting of them a felony, Congress should not now be deemed simultaneously to have included such cards within the scope of Section 1546, which also punishes counterfeiting (as well as the knowing possession or alteration, of documents required for entry), thereby creating some overlap in coverage.[8] That argument, however, overlooks the fact that the two sections are designed to deal with quite distinct problems. Section 266(d) was intended to implement and protect the alien registration scheme in Chapter 7 of the 1952 Act by punishing the counterfeiting of alien registration receipt cards. Section 1546 of the Act, as amended, on the other hand, was intended to safeguard the interest of the United States in the integrity of documents designated by law as appropriate for use in effecting entry into this country.

Assuming, as respondent contends, that Congress was aware at the time that it enacted the comprehensive 1952 Act that alien registration receipt cards had less than one month earlier been given by regulation

[7] The Section is presently codified as 8 U.S.C. 1306(d), under the heading "Counterfeiting"; it was enacted in Chapter 7 of the 1952 Act dealing with "Registration of Aliens."

[8] Both sections provide an imprisonment penalty of up to five years for a violation; Section 266(d) provides for an additional fine of up to $5,000, whereas Section 1546 permits an additional fine of only $2,000.

(17 Fed. Reg. 4921–4922, May 29, 1952) for the first time an "entry" function," in addition to their traditional function of evidencing registration, it is not unreasonable to conclude that Congress intended that they be included within the scope of *both* sections of the 1952 Act, notwithstanding the overlap in coverage as to counterfeiting. Section 1546, unlike Section 266(d), reaches activity other than counterfeiting: it proscribes in addition (1) the possession of entry documents known to have been forged or counterfeited,[10] and (2) the alteration of such documents. A con-

[9] It is not at all clear that Congress had such knowledge. The broader language in amended Section 1546 appears in the several relevant committee reports that antedated by some months the new regulation (see p. 5 and n. 4, *supra*). It is, therefore, quite possible that the overlap in coverage as to counterfeiting may be explained in part by the fact that the legislature, at the time it enacted the 1952 Act, did not focus on the administrative change giving alien registration receipt cards an additional function as entry documents. This, of course, would not mean that such cards are outside the scope of Section 1546. Congress intended to expand Section 1546 to reach any "other document" which then, or in the future, was designated as "required for entry into the United States." Thus, the inclusion of alien registration receipt cards within that Section is wholly consistent with the legislative purpose, since Congress created in Section 1546 a category of documents, the knowing possession of which, if known to be altered or counterfeited, it meant to proscribe (see n. 5, *supra*).

[10] Respondent was indicted for having "knowingly and intentionally possessed a falsely made, altered, forged and counterfeited alien registration receipt card" with knowledge that the same "was falsely made, altered, forged and counterfeited; in violation of Title 18, United States Code, Section 1546" (App. 7–8).

struction of this provision in the manner urged by respondent would thus have the undesirable and unintended effect of insulating from punishment the conduct of altering alien registration receipt cards, or of knowingly possessing such cards with knowledge that they had been altered or counterfeited.

Such activity is not punished under any other provision of the 1952 Act. Section 1325 of Title 8, United States Code, on which respondent places heavy reliance (Resp. Br. 28–29), reaches an entirely different offense. It provides that "Any alien who * * * (3) *obtains entry* to the United States by a wilfully false or misleading representation or the wilfull concealment of a material fact" shall be guilty of a misdemeanor (emphasis added).[11] It is aimed at actual, rather than potential, misuse of the entry document. It therefore does not follow from the fact that counterfeiting of alien registration receipt cards may be punished under either Section 266(d) or Section 1546 that Congress meant to exclude such cards entirely from the proscription in the latter provision.[12]

[11] Curiously, respondent concedes that use of the term "entry" in this provision *includes* aliens seeking to reenter the United States (Resp. Br. 29), despite his argument that the same term in a similar context under a separate provision of the same Act must be read so as to *exclude* from coverage those seeking reentry.

[12] It is conceded that the alien registration receipt card is a document on which an alien may be permitted to enter the United States (Resp. Br. 29). *Lau Ow Bew* v. *United States*, 144 U.S. 47, relied on by respondent, is thus not in point. That case dealt, not with the statute involved here, but with the Chinese Exclusion Act of 1882. The Court held that that Act, which required a certificate from the Chinese government on

II. THE IMMIGRATION AND NATURALIZATION SERVICE FILE OF ANOTHER ALIEN, WHOSE REGISTRATION RECEIPT CARD WAS THE ONE THAT RESPONDENT POSSESSED, WAS PROPERLY ADMITTED INTO EVIDENCE

The district court allowed, over respondent's objection, the introduction of the Immigration and Naturalization Service file of one Diana Vargas-Garcia, which contained a copy of her application, on an official form, for a new alien registration receipt card. The application indicated that her card had been stolen with her purse in Mexico around January 12, 1968 (App. 120). It was this card that was found in

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behalf of Chinese persons about to come to the United States, did not apply to a Chinese merchant who had long been a resident of this country and who had left it temporarily with the intent to return. Petitioner also relies on *McFarland* v. *United States*, 19 F. 2d 807 (C.A. 6). That case concerned a separate provision of the Immigration Act of 1924, dealing with "false personation." The court held that a statute punishing an individual who "on applying for an immigration visa or permit, or for admission to the United States, personates another" did not apply to an alien who presented another's citizenship papers, since the intent of Congress was to reach only acts of personation involving the specified kinds of documents (*i.e.*, visas or permits). The decision, however, disregards the statutory phrase, "or for admission to the United States." The court in *Mouyas*, *supra*, expressly rejected *McFarland* in upholding a conviction under the same statute (now paragraph 3 of Section 1546) involving a fraudulent passport. *Mouyas* was referred to with apparent approval in the Senate Report antedating passage of the 1952 Act. See S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 647–648.

Finally, for the reasons discussed above, the court of appeals in this case properly declined to follow the opinion of Judge Igoe in *United States* v. *Fernandez-Gonzales* (Resp. Br. App. 1a–6a), dismissing an indictment under Section 1546 for essentially the same reasons advanced here by respondent.

respondent's possession in altered form, giving rise to the present prosecution.

Respondent argued at trial, as he does here, that the application of Miss Vargas-Garcia for a new card was hearsay and that its introduction violated his right to confrontation under the Sixth Amendment.[13] His objection was overruled upon a showing by the government that the file had been certified by the district director, who is empowered (see 8 U.S.C. 1103; 8 C.F.R. 103.7) to certify any official record as a true copy (App. 110–112).

The admission of the file was proper. It has long been established that official government records, when properly authenticated as here,[14] are admissible as an exception to the hearsay rule. See 28 U.S.C. 1733; Rule 44(a), Fed. R. Civ. P.; Rule 27, Fed. R. Crim. P. Numerous decisions hold that the admission of such records in a criminal case does not infringe the right of confrontation. See *e.g., United States* v. *Sacco,* 428 F. 2d 264, 271–272 (C.A. 9), certiorari denied, 400 U.S. 903 (I.N.S. records); *United States* v. *Lloyd,* 431 F. 2d 160, 163–164 (C.A. 9), certiorari denied, 403 U.S. 911 (Selective Service file); *United States* v. *Holmes,* 387 F. 2d 781, 783–784 (C.A. 7), certiorari denied, 391 U.S. 936 (Selective Service file); see also

[13] This argument, and the remaining arguments discussed *infra*, were made to the court of appeals, but that court found it unnecessary to pass on these contentions.

[14] The certification by the district director was sufficient for authentication; there is no necessity to call a government official as a witness to identify a certified I.N.S. document. See *Maroon* v. *Immigration and Naturalization Service*, 364 F. 2d 982, 987 (C.A. 8).

United States v. *Leathers,* 135 F. 2d 507, 511 (C.A. 2) (business records); *Dutton* v. *Evans,* 400 U.S. 74, 96 (Harlan, J., concurring).

The fact that the application questioned here was completed by a private individual rather than by a government officer or agency does not affect the admissibility of the document. Many government agencies by law authorize or require private persons to furnish them with information which is then retained, as an official government or business record, in that person's file. Such was the function of the application form completed by Diana Vargas-Garcia, since, under 8 C.F.R. 264.1(c), any alien who loses his evidence of registration must promptly apply for a new card. Thus, the very nature of the application in this context carried a substantial guarantee of trustworthiness about the information it contained. See *Dutton* v. *Evans,* 400 U.S. 74; *Kay* v. *United States,* 255 F. 2d 476, 480–481 (C.A. 4).

Moreover, the application of Miss Vargas-Garcia was expressly offered, not to prove the truth of her statements contained therein, but merely to show that the Service had in fact received from her a request for a new card (App. 112). The agents testified that the card in respondent's possession appeared to have been altered. The Immigration file of Miss Vargas-Garcia was thus significant for the purpose of showing that an alien, whose registration number was identical to the number on the card respondent possessed, had applied for a new card. From this, the trial judge could properly conclude, without regard to the truth

of Miss Vargas-Garcia's statement that her card had been stolen, that the card in respondent's possession had originally been issued to Diana Vargas-Garcia and had subsequently been altered.

III. RESPONDENT'S PRODUCTION OF HIS ALIEN REGISTRATION RECEIPT CARD ON REQUEST DID NOT CONSTITUTE AN UNREASONABLE SEIZURE OF EVIDENCE IN VIOLATION OF THE FOURTH AMENDMENT.

Respondent also seeks to establish a Fourth Amendment violation in this case, based on the action of investigator Burrow in asking to see respondent's alien registration receipt card on his second visit to the apartment. The argument apparently is that the agent, in making such a request, exceeded the scope of consent given him by the arrested prisoner Rodriguez-Ortiz (a co-tenant with respondent) to enter the apartment.

But, even if it could be shown that no consent had been given by Rodriguez-Ortiz to permit the agents' entry—an assumption at odds with the agents' sworn testimony [15]—a simple request to see respondent's alien registration receipt card, which is authorized

[15] Investigator White, who accompanied Burrow and Rodriguez-Ortiz to the apartment, testified that Rodriguez-Ortiz "was returning at his request to get his clothing and personal possessions" (App. 57). Although Rodriguez-Ortiz did not expressly invite the agents into the apartment, it was he who led them to the door and then opened it with a key, whereupon they "all went in together" (App. 57, 59). Clearly, there was implicit consent for the agents to enter the dwelling.

by statute (8 U.S.C 1357(a)), would not have infringed on any constitutional rights of respondent. Since Rodriguez-Ortiz was in custody, the agents had a right to accompany him while he gathered his belongings. Once inside, they were not required to ignore respondent or to abstain from requesting him to produce his alien registration receipt card. Moreover, his decision to produce the card required an intervening act of volition and will on his part, thus removing whatever link might have existed between the allegedly illegal entry and what respondents characterize as a "search." The agents' presence in the apartment in these circumstances, while a "but for" condition to their request to see the card, did not effectively cause him to produce it. See *Wong Sun* v. *United States*, 371 U.S. 471, 487–488, 491; *Brown* v. *United States*, 375 F. 2d 310 (C.A.D.C.), certiorari denied, 388 U.S. 915; *Smith and Bowden* v. *United States*, 324 F. 2d 879, 881 (C.A.D.C.), certiorari denied, 377 U.S 954.

Bumper v. *North Carolina*, 391 U.S. 543, relied on by respondent, is not in point. That case held invalid a purported consent given in response to an *assertion* of legal authority by police to search (*i.e.*, a warrant). Here there was no such assertion. If, as we have argued in our opening brief, the agents had a right to request the card, compliance with that request cannot, in the circumstances of this case, be deemed involuntary. See *Davis* v. *United States*, 328 U.S. 582; *United States* v. *Montez-Hernandez*, 291 F. Supp. 712 (E.D. Cal.).

IV. THERE WAS NO VIOLATION OF DUE PROCESS RESULTING FROM THE INABILITY OF RESPONDENT TO INTERVIEW WITNESSES WHO HAD BEEN DEPORTED

Respondent's final contention is that he was deprived of due process of law by the denial of his pre-trial motion for an opportunity, at government expense, to try to locate Miguel Rico (App. 35). He further claims that, because of allegedly improper delay in appointing counsel for him, his attorney was unable to interview Rodriguez-Ortiz before the latter had been deported (Resp. Br. 33–34). Both arguments warrant little attention.

1. Respondent has never satisfactorily indicated in what respect the testimony of either witness would have been material.[16] Compare Rule 17(b), Fed. R. Crim. P. With respect to Rico, the trial judge was not required, absent some showing of materiality, to authorize funds to try to locate a person in a foreign country. Cf. *United States* v. *Wolfson*, 322 F. Supp. 798, 819 (D. Del.).

2. As for the claim of improper delay, the record shows that Rico, Rodriguez-Ortiz and respondent were arrested on November 18, 1968. Deportation proceedings against respondent were commenced on November 20, and concluded the following day in an order of deportation. A federal grand jury indicted respondent

[16] Respondent apparently desired the witnesses to testify on the issue whether the agents had entered the apartment on the second occasion with consent (Resp. Br. 33–34). Since Rico remained in the car with agent Jacobs at the time of the second

and Rodriguez-Ortiz on December 5, 1968.[17] Both cases were set for arraignment on December 12, 1968. On that day, Rodriguez-Ortiz entered a plea of guilty before Judge Hoffman, who sentenced him to probation in lieu of a prison term on condition that he be immediately returned to Mexico and make no future illegal entry into the United States. Respondent's arraignment before Judge Lynch was continued to December 16, 1968, due to the illness of the judge. On that date, Judge Lynch appointed respondent's present counsel to represent him and respondent entered a plea of not guilty.

Respondent argues that, had counsel been appointed before December 12, he would have had an opportunity to talk to Rodriguez-Ortiz; the failure to bring him before a United States Commissioner (App. 72), he contends, resulted in the delay in appointment of counsel and was prejudicial. There was, however, no need to bring respondent before a Commissioner prior to December 5, 1968, since he was not then being held on a criminal charge, but rather was being detained by virtue of a civil deportation order. Thereafter, it is clear that there was no purposeful

visit to the apartment, it is difficult to see what light he could shed on this issue. In any event, as we have already indicated, the question of "consent" is not relevant, in the circumstances of this case, to the voluntariness of respondent's production of the alien registration receipt card. Moreover, there is no reason to believe that the aliens' testimony would have been favorable to respondent.

[17] Rico was deported and not indicted.

delay by the government in bringing respondent before the judge for arraignment or in having counsel appointed. There is thus no cause for reversal of the conviction. See *United States* v. *Perlman*, 430 F. 2d 22, 25–26 (C.A. 7), certiorari denied, 400 U.S. 832.[18]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of conviction reinstated.

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OCTOBER 1971.

[18] In *Perlman*, the government paroled and then deported an alien co-defendant of the accused who was the sole direct participant in an alleged illegal marihuana scheme and who had previously pleaded guilty. Finding that the prosecutor had not taken part in the decisions which caused the removal of the potential witness from the country, the court concluded that since there was no deliberate attempt by the government to suppress evidence and no reason to believe the witness' testimony would have been favorable to the accused, no violation of constitutional rights had occurred. The present case follows *a fortiori* from *Perlman* because the materiality of the testimony of Rico and Ortiz to the offense charged here is wholly speculative, whereas in *Perlman* the potential witness "obviously possessed evidence regarding Perlman's participation in the illegal scheme" (430 F. 2d at 25).

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